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June 28, 1999

HAND DELIVERED

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
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Room TW-A325
Washington, D.C. 20554

Re: CC Docket No. 98-92

Dear Ms. Salas:

Transmitted herewith, on behalf of TDS Telecommunications Corporation (TDS TELECOM), are an original and 12 copies of its Petition for Reconsideration on the Hyperion Petition for Preemption of Tennessee Regulatory Authority Order, CC Docket No. 98-92.

In the event of any questions concerning this matter, please communicate with this office.

Very Truly Yours,

Margot Smiley Humphrey

Margot Smiley Humphrey

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Enclosure

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
AVR, L.P. d/b/a	)	
Hyperion of Tennessee, L.P.	)	
Petition for Preemption of	)	
Tennessee Code Annotated	)	CC Docket No. 98-92
§ 65-4-201(d) and Tennessee	)	
Regulatory Authority Decision	)	
Denying Hyperion's Application	)	
Requesting Authority to	)	
Provide Service in Tennessee	)	
Rural LEC Service Areas	)	

PETITION FOR RECONSIDERATION

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Rural LEC Service Areas	)	

PETITION FOR RECONSIDERATION

TDS Telecommunications Corporation (TDS Telecom), with and on behalf of its four wholly-owned subsidiaries in Tennessee, Tennessee Telephone Company (Tennessee Telephone), Concord Telephone Exchange, Inc., Humphreys County Telephone Company and Tellico Telephone Company and by its attorneys, files this petition to urge the Commission to reconsider and reverse its preemption decision in the above-captioned preemption proceeding arising under section 253 of the Telecommunications Act of 1996 (1996 Act).[1]

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[1] AVR, L.P. d/b/a Hyperion of Tennessee, L.P., Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas, CC Docket No. 98-92, FCC 99-100 (rel. May 27, 1999) (Order).

I. INTRODUCTION

Hyperion of Tennessee, L.P. (Hyperion), a facilities-based competitive local exchange carrier (CLEC), petitioned the Tennessee Regulatory Authority (TRA) for permission to extend its service into an area in Tennessee served by the small rural carrier Tennessee Telephone. In its Denial Order,[2] the TRA denied that request based on Tennessee Code Section 65-4-201(d) (section 65-4-201(d)), a statute intended to preserve and advance universal service in Tennessee. When the Federal Communications Commission (Commission) reviewed the Denial Order, rather than finely crafting its preemption as required by federal preemption standards, it preempted broadly.

Boiled down to basics, the Order preempts not only the TRA enforcement of section 65-4-201(d) but also that law in its entirety. The preemption denied the authority of the Tennessee legislature and the TRA to protect the interests of Tennessee's consumers in universal service, public welfare, quality of service and general rights of consumers set forth in section 253(b) of the Communications Act of 1996 (1996 Act) as exceptions to the general open-competition mandate of section 253(a). The TRA had relied on that authority to implement the consumer protection policies of the Tennessee law by denying Hyperion's application to compete as a virtually unregulated carrier for selected large business customers in Tennessee Telephone's largely rural study area. The TRA's action reflected Tennessee Telephone's regulatory

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[2] Order Denying Hyperion's Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, CC Docket No. 98-0001 (Tennessee Authority Apr. 9, 1998) (Denial Order).

obligation to provide universal service as a carrier of last resort, pursuant to traditional common carrier regulation imposed to maximize consumer welfare. The Commission held: (a) that the state authority reserved by section 253(b) was automatically and wholly extinguished because the TRA had barred Hyperion's entry, and (b) that the universal service necessity underlying the law and the TRA action -- established in the record -- were not even entitled to consideration. The Commission reiterated, and should have followed, its position that "competitive neutrality" requires recognition of differences regardless of whether the competitively disadvantaged entity is the incumbent or a market entrant. Its overbroad preemption conflicts with its duty under section 253(b) and federal law interpreting the Supremacy Clause of the U.S. Constitution to preempt only to the extent necessary to correct a "violation or inconsistency."

TDS Telecom explains below why the Commission's interpretation of section 253(b) is unlawful and why the Commission should restore to Tennessee the authority to take this action as necessary and competitively neutral because of: (a) the profound differences in the regulatory and competitive postures of Hyperion, compared to Tennessee Telephone and other similarly situated incumbent rural telephone companies in Tennessee, and (b) the current turbulent and changing state of universal service and infrastructure advancement safeguards at this point in the implementation of the 1996 Act.

II. THE COMMISSION SHOULD REFORM ITS INTERPRETATION OF SECTION 253 TO RESTORE THE AUTHORITY, RESERVED FOR THE STATES BY CONGRESS, TO PROTECT CONSUMERS FROM UNFAIR AND UNBALANCED COMPETITION

The sole rationale the Order provides for preempting the TRA's denial of Hyperion's application and section 65-4-201(d) is that the Commission has concluded before,[3] as it does here,[4] that because "these state and local [sic] legal requirements shield the incumbent from competition by other LECs, the requirements are not competitively neutral, and therefore do not fall within the reservation of state authority set forth in section 253(b)." In construing section 253, the Commission clings to its view[5] that a "lack of competitive neutrality," evident in any legal requirement that "favors incumbent LECs over new entrants (or vice versa)" (emphasis added), renders both the TRA enforcement order and section 65-4-201(d) "ineligible for the protection of section 253(b)."

The consequences of the Commission's decision to treat its notion of "competitive neutrality" as dispositive are harsh. The Commission holds that a lapse from neutrality excuses it from even considering the record before it showing that the TRA's enforcement of state law is "consistent with section 254" and "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers," as section 253(b) requires.

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[3] Order at ¶ 13.

[4] Order at ¶ 12.

[5] Order at ¶¶ 15-16.

A. Competitive Neutrality Is Not Only for Competitors

The Order's conception of "competitive neutrality" is bizarre, and it is not validated or immunized from challenge simply because the Commission has embraced it before by partially preempting Texas law and preempting a Wyoming requirement.[6] Indeed, the Commission's decision here belies its own laudatory language proclaiming the statute's "competitive neutrality" requirement as a two-way street: Its decision conflicts with its declaration that even-handed application of the competitive neutrality requirement is mandatorily applicable, under the 1996 Act and its legislative history, not only to "one portion of a local exchange market – new entrants – and not to all carriers in that market," which, it says, has been "consistently construed" by the Commission as "requiring competitive neutrality among the entire universe of participants and potential participants in a market."[7] The Order's proclamations about the universal applicability of the Commission's interpretation of "competitive neutrality" follow and build on its early recognition that a section 253 preemption challenge requires the Commission to "consider whether the requirement in question materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[8]

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[6] The Public Utility Commission of Texas, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3511, ¶¶ 106-07 (1997) (Texas Preemption Order); Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15656-57, ¶¶ 38-39 (1997) (Silver Star Preemption Order).

[7] Order at ¶ 16.

[8] See California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, Memorandum Opinion and Order, 12 FCC Rcd 14191, ¶ 31 (rel. July 17, 1997).

The Commission has legitimized an uneven regulatory playing field by its one-sided interpretation of "competitive neutrality," as the largely undisputed facts in the record show. For example, the record shows that TDS Telecom's obligations include study area wide universal service, averaged pricing, and a regulated rate structure that requires Tennessee Telephone to set its business rates higher than residential rates regardless of costs. Hyperion has not even hinted that it shares any of these obligations. No one has denied that Hyperion is free to, and does, target its services to business, institutional and governmental customers or that Tennessee Telephone and other rural telephone companies are dependent on retaining these customers to sustain the implicit support flows in effect in Tennessee because loss of large customers puts significant upward pressures on the rates for residential and small business customers to which competitive alternatives are unlikely to be available.

B. The Commission Failed to Apply Its Stated Policy of Even-Handed Implementation of "Competitive Neutrality"

Notwithstanding the record, the Order does not apply the principle of "competitive neutrality" for the incumbent as well as the competitor to the vastly disparate requirements the record establishes. Instead, the Commission refused to consider the facts in the record about Tennessee Telephone's dramatically different regulatory obligations. The Commission ignored the showing that unregulated "cherry-picking" of the high volume customers that support implicit state support flows impairs Tennessee Telephone's ability to fulfill its regulatory obligations because the high volume customers Hyperion targets are crucial to both: (a) universal service,

and (b) the availability of network advancements to the residential customers Hyperion does not pretend to serve. The Commission agreed[9] that "to qualify for protection under section 253(b), a state legal requirement need not treat incumbent LECs and new entrants equally in every circumstance." It referred to its own holdings elsewhere that a competitively neutral provision "must not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber" and "must not disparately affect the ability of competing service providers to earn a normal return." But the Commission went on to reach a result consistent only with Orwell's Animal Farm, where "some pigs are more equal than others."

The Commission deliberately blinded itself to its own correct interpretations of "competitive neutrality" and the uncontradicted facts that, for example, (a) Tennessee Telephone is subject to rate of return regulation, while Hyperion is entitled to any return it is able to earn, (b) the TRA has obligated Tennessee Telephone to deploy more advanced network capabilities throughout its service area, while Hyperion need only offer advances of its choice to the lucrative high volume customers it chooses to target, (c) Tennessee Telephone, unlike Hyperion, is obligated to charge its largest business customers enough to support below-cost local rates for its highest cost residential customers, so that Hyperion has a legally-imposed "appreciable, incremental cost advantage" over Tennessee Telephone whenever "competing for a specific [i.e. high-volume] subscriber," (d) that, unlike Hyperion, Tennessee Telephone is not free to exit the

[9] Order at n. 46.

market at will, and (e) that Tennessee Telephone is subject to regulatory burdens and expenses that include accounting requirements, performing jurisdictional separations, access charge regulation under part 69 of the Commission's rules and Commission rules about separating regulated and regulated services, dealing with affiliates and numerous other directives, while Hyperion has virtually no regulatory burdens or requirements. Tennessee Telephone's rates have been set to ensure affordable rates throughout its own study area and those of the other TDS Telecom rural telephone companies in Tennessee, a further competitive disadvantage that does not affect an entrant such as Hyperion. This also means that pressures to increase rates, fueled by the burdens of uneven regulation, will affect rural customers in Tennessee Telephone's sister companies, as well. Indeed, preemption of the TRA's authority to preserve universal service during the tumultuous transition to competition, deregulation and sustainable universal service arrangements, deprives the customers of all rural telephone companies in Tennessee of the TRA's role in preserving implicit support flows until they are suitably reformed.

C. The Statute Does Not Support the Commission's Presumption That Disparate Obligations Can Never Justify Transitional Exclusion

The Commission asserts that

> competitive neutrality ... does not countenance absolute exclusion, and we need not and therefore do not reach the question of the extent to which state commissions may treat competing LECs differently from incumbent LECs in certain instances.

However, this assertion is not supported by the 1996 Act or its legislative history. The statute does not limit the scope of remedy a state can justify under section 253(b) to protect the interests

listed there. And these protected interests are the very ones the record shows TRA invoked in applying the law to deny Hyperion's entry to pursue its customary cherry picking marketing strategy.[10] The Tennessee law was plainly an interim measure, since it required reevaluation every two years, so that no permanent exclusion can be assumed. It is undeniable that the 1996 Act already gives the TRA the authority to refuse Hyperion entry for an unlimited period unless it qualifies as an eligible telecommunications carrier providing universal services throughout Tennessee Telephone's study area under 1996 Act sections 253(f) and 214(e), to deny it the interconnection strategies in sections 251(b) and (c) under section 251(f)(1) and (2). Section 253(b) must give it authority to do more than that, or it would be superfluous, contrary to statutory interpretation principles that dictate giving meaning to all language in a law.[11] Both the Tennessee legislature and the TRA necessarily recognized that, until there were changes sufficient to protect Tennessee consumers without the implicit support legally embedded in Tennessee Telephone's rate structure, virtually unregulated competitive entry imperils the universal service, public safety and welfare, service quality and consumer interests section 253(b) gave states the right to protect. Thus, the law and the enforcement action are entitled to the protection of section 253(b). Section 253(b) is one of the four express exceptions Congress carved out of the competition mandate of section 253(a). In fact, the four exceptions in

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[10] See, e.g., Opposition of TDS Telecom, filed July 13, 1998, pp. 5-6.

[11] Market Co. v. Hoffman, 101 U.S. 112 (1879); Citizens v. United States EPA, 600 F. 2d 844 (D.C. Cir. 1979).

subsections 253(b), (c) (e) and (f)) make up the majority of the statutory provision. It is simply not a rational interpretation of any of these express statutory exceptions to say that state action taken under its authority is presumptively unlawful if it interferes with entry.

Competition is one primary objective of the Act, to be sure, but it is not the only goal. The universal service objective of section 254 is expressly invoked by section 253(b), and the Commission itself frequently quotes legislative history that places deregulation alongside competition as basic objectives.[12] It amounts to rewriting the 1996 Act and the legislative objectives for the Commission to say that "competitive neutrality" trumps universal service in section 253(b), although the state's concern arises precisely from the adverse effects of imposing unregulated competition in a market where a highly regulated incumbent is necessary to maintain implicit support flows relied upon by the TRA.[13]

D. Section 253(b) Provides States Authority to Avoid Real Tensions Between Universal Service and Competition Which Are Unavoidable During the Transition to Competition, Deregulation and Sustainable Universal Service Support

The Commission's assertion[14] that even suggesting that state entry restrictions are necessary and appropriate to preserve universal service reflects a "false choice" is simplistic. The

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[12] See, e.g., Federal State Joint Board on Universal Service, Report & Order, CC Docket No. 96-45, 12 FCC Rcd 8776, ¶ 48 (1997), as corrected by Federal State Joint Board on Universal Service, CC Docket 96-45, Errata, FCC 97-157 (rel. June 4, 1997), appeal pending, Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir. filed June 25, 1997), quoting from Conference Report at 113, "to provide for a pro-competitive, de-regulatory national policy framework...."

[13] The TRA is currently considering state universal service issues in Universal Service Generic Contested Case, Docket No. 97-00888.

[14] Order at n. 57.

1996 Act certainly preserves the prospect of competition for rural markets, but it also demonstrates irrefutably that Congress believes allowing unfettered competition (section 2 and (f)), jump-starting competition by providing access to the incumbent's network (section 251(b) and (c)) or equalizing a competitor's access to support in the study area of a "rural telephone company" such as Tennessee Telephone (section 214(e)(2)) are not presumptively consistent with universal service and section 254.

Indeed, the Commission's quotation[15] from its Universal Service Order explicitly states that "a principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges." However, the Commission here brushed aside TDS Telecom's showing that the Commission has not yet finished its task under section 254 of making federal universal service sustainable in a competitive marketplace.

In fact, the Commission has recognized since its initial universal service pronouncements that the 1996 Act does not compel states to make implicit state support explicit, and most have not done so. The Universal Service Joint Board and the Commission are well aware that competition puts pressure on implicit support flows such as study area-wide support averaging.[16] It is unconscionable for the Commission to rely on the efficacy of section 254 to prevent inroads on universal service that rests on implicit support – which is what the TRA acted here to preserve – when the nature and sufficiency of the federal support mechanism for rural carriers, including

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[15] Order at n. 57.

[16] Seventh Report and Order, FCC 99-119 CC Docket No. 96-45 (rel. May 28, 1999).

Tennessee Telephone, will not be decided until 2001, at the earliest, and the pressure on implicit support within Tennessee from competition on a non-level playing field remains as threatening for Tennessee's universal service, service quality and network advancement, and consumer rights as ever.[17] Indeed, the pressure on incumbent local exchange carriers appears to have been stepped up recently, when Chairman Kennard and several Senators announced a joint plan to achieve advanced network capabilities in rural areas – well before the Commission has promised to reexamine the definition of universal service, which currently does not provide support for advanced network capabilities except for schools, libraries and certain health care providers.[18]

III. THE COMMISSION HAS OVERSTEPPED THE LEGAL AND STATUTORY LIMITS OF FEDERAL PREEMPTION

Even if the Commission had adequately justified its preemption of the TRA's order denying Hyperion's application, its blanket preemption of section 65-4-201(d) of the Tennessee law exceeds its authority under federal law interpreting the Supremacy Clause of the U.S. Constitution and the specific language of section 253(b). The Commission failed even to make

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[17] The Commission has also cautioned that "federal support should not necessarily be available to replace eroding implicit intrastate support, absent a showing that the state is unable to maintain reasonable comparability of rates."

[18] "Kennard, Rural Senators Plan Advanced-Services Initiative, Telecommunications Reports, June 14, 1999, p. 14 (mentioning possible future regulatory relief, but not even alluding to universal service support). Tennessee's incumbent rural telephone companies have also been charged since the early 1990s with network upgrades under the Tennessee FYI Plan, which erosion of their ability to average and comply with Tennessee's implicit support obligations could undermine.

an effort to tailor the preemption to allow the TRA to implement its legislature's purpose to the full extent permissible by law.

The federal government is prohibited by established federal legal principles from preempting state law to an extent greater than necessary to dispose of the conflict between the two laws.[19] Indeed, in the Silver Star case cited in the Order, the Commission itself acknowledged that the Commission is statutorily bound to limit its preemption of state law to "the extent necessary."[20] Thus, in the case at hand, the Commission should have narrowly defined the extent to which it preempted Tennessee's authority.

However, the Commission instead adopted a broad and general preemption of the enforcement of the TRA's Denial Order and section 65-4-201(d).[21] By failing to delineate specifically and limit as much as possible the extent to which the Commission preempts Tennessee's laws, the Commission violates federal preemption standards.

As it did in Silver Star, the Commission should articulate what remains of the Tennessee statute's consumer protections. There the Commission specified that the Wyoming Commission's authority "remains almost entirely intact. The lone and narrow exception is that

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[19] Dalton v. Little Rock Family Planning Services, et. al., 516 U.S. 474 (1996) ("In a preemption case such as this, state law is displaced only 'to the extent that it actually conflicts with federal law.' Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 204 (1983)").

[20] Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, 13 FCC Rcd 16356, 16362 (1998).

[21] Order at 2.

the Wyoming Commission cannot deny a potential new entrant's application for a concurrent CPCN solely because an incumbent LEC opposes the application."[22] At the very least, the Commission cannot rob Tennessee of the authority to pursue the legitimate rural safeguards intended by the Tennessee law. Tennessee's duty to protect consumers in the state and responsibility for promoting and advancing universal service should not be negated because of one "enforcement" measure that the Commission has decided is in conflict with the 1996 Act.

IV. CONCLUSION

The Commission's Order has unlawfully deprived Tennessee of its ability under section 253(b) of the 1996 Act to preserve implicit intrastate support flows, still implemented by heavily regulated incumbent rural telephone companies. That authority is particularly necessary during the transition to an environment where universal service for such areas has been made sustainable in the face of unregulated competitors' rivalry for the high volume low cost customers that make implicit support possible. The Commission cannot justify denying Tennessee's authority under its "competitive neutrality" standard. It did not even-handedly apply that standard, given the unbalanced regulatory regime that puts Tennessee Telephone and Tennessee's other rural telephone companies at a competitive disadvantage compared to an unregulated carrier such as Hyperion. Even if the Commission's preemption of the TRA's denial of entry by Hyperion that threatens implicit state support flows were not unlawful, the Commission should not have preempted section 65-4-201(d) in its entirety, since the TRA is

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[22] Silver Star at 16356.

obliged to take all steps consistent with the 1996 Act to carry out the intent of its legislature to provide adequate transitional safeguards, reviewed every two years, for Tennessee's rural citizens. Accordingly, the Commission should reconsider and reverse its decision to preempt the TRA's Denial Order and section 65-4-201(d).

Respectfully submitted,

TDS TELECOMMUNICATIONS CORPORATION

By: /s/ Margot Smiley Humphrey
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By: /s/ Julie A. Barrie
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Its Attorneys

June 28, 1999

CERTIFICATE OF SERVICE

I, Victoria C. Kim, a secretary in the offices of Koteen & Naftalin, hereby certify that true copies of the foregoing TDS TELECOM's Petition for Reconsideration on CC Docket No. 98-92 have been served on the parties listed below, via first class mail, postage prepaid on the 28th day of June, 1999.

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